

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

James Purkett, Superintendent
Farmington Correctional Center.....Petitioner
vs.
Jimmy Elem.....Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

WHETHER A VENIREPERSON'S INDIVIDUAL CHARACTERISTIC OF APPEARANCE CONSTITUTES A LEGALLY SUFFICIENT NON-RACIAL REASON AND A NON-PRETEXTUAL REASON FOR A PROSECUTOR'S USE OF A PEREMPTORY CHALLENGE UNDER HERNANDEZ V. NEW YORK, 111 S.Ct. 1859 (1991).

The Court of Appeals for the Eighth Circuit in deciding this case has not overlooked or misconstrued a significant issue, that issue being whether the state prosecutor presented a racially neutral reason which was not a pretext for striking African-American jurors from the jury panel where the defendant was an African-American.

The Court's Opinion does not conflict directly with Batson v. Kentucky, 476 U.S. 79, 90 L.Ed. 2d 69, 106 S.Ct. 1712 (1986), or its progeny, Hernandez v. New York, 111 S.Ct. 1859 (1991).

The Court's opinion is based upon a correct interpretation of the facts of the record below and a correct application of the law of the United States of America.

The Petitioner states that the Court of Appeals incorrectly analyzed the second and third steps involved in making a Batson challenge and incorrectly finding the state had made an improper use of the peremptory challenge in a manner violating the equal protection clause of the Fourteenth Amendment of the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 90 L.Ed. 2d 69, 106 S.Ct. 1712 (1986).

The Petitioner has alleged that the Court of Appeals' method of review in the case at bar conflicts with Courts

from other Circuits. The Court of Appeals applied the correct legal standard in this review of the prosecutor's use of peremptory challenges.

Hernandez v. New York, 111 S.Ct. 1859 (1991), sets out the three steps involved in a Batson challenge as follows:

First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. Id. at 96-97, 106 S.Ct. at 1722-1723. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Id. at 97-98, 106 S.Ct. at 1723-1724. Finally the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. Id. at 98, 106 S.Ct. at 1723.

The Petitioner admits the Panel correctly applied Hernandez concerning the issue of whether the Respondent made a *prima facie* case.

The Petitioner has stated the Court of Appeals incorrectly blurred the second and third steps of a Batson Challenge.

The Petitioner finds no fault with how the Court of Appeals has applied the first step of the Batson decision. The Petitioner has conceded the Respondent has made a *prima facie* showing the prosecutor exercise a peremptory challenge on the basis of the race of the defendant. Petitioner is an African-American man. (Petitioner's Appendix A-2). The prosecutor at trial used peremptory challenges to strike two (2) African-American jurors. (Petitioner's Appendix A-3).

Doss v. Frontenac, 14 F.3d 1313 (8th Cir. 1994) held

once the objecting party makes a *prima facie* showing, the burden shifts to the challenging party to offer a race-neutral reason for challenging the minority juror that is "clear and reasonably specific" and related to the case to be tried, quoting from Batson, 476 U.S. at 98, 106 S.Ct. at 1724.

Batson is significant in the jury selection process because of the obligations it creates for the government.

Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, "as long as that reason is related to his view concerning the outcome of the case to be tried," the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. Id. 476 U.S. at 89, 90 L.Ed. 2d at 83 (13.14a).

As the Court of Appeals correctly notes the ability to perform the duties of the juror is the basis of whether or not a person should serve or not serve upon a jury. The United States Supreme Court, in Batson, 476 U.S. at 87, declared

The harm from discriminatory jury selection extends beyond that inflicted on the defendant on the excluded juror to touch the entire community. Selection procedures that purposely exclude black persons from juries undermine public confidence in the fairness of our system of justice.

The Petitioner states the Court of Appeals failed to correctly apply Hernandez in the case at bar. Batson requires for its second step, the prosecutor must articulate a race-neutral explanation for striking the jurors in question. The Court of Appeals correctly states the second

requirement of Batson:

Once the Defendant makes a *prima facie* showing, the burden shifts to the prosecution to come forward with a neutral explanation for the peremptory strikes. (Petitioner's Appendix A-7)

The main thrust of the Petitioners argument is found on Page 15 of the Petitioner's Petition for Writ of Certiorari in which the Petitioner writes, "Since no discriminatory intent was inherent in the prosecutors explanation, if the proffered reason should be deemed race-neutral."

The Court of Appeals correctly found

In the present case, the prosecutor's comments, "I don't like the way (he) look(s), with the way the hair is kept...And the mustache and the beard looks suspicious to me

do not constitute a legitimate race-neutral reasons for striking juror 22. (Petitioner's Appendix A-11).

The Court of Appeals correctly applied the second step of Batson, which requires the burden shift to the prosecutor to articulate a race-neutral explanation for striking the juror's in question, when it held

in such a case as this, where the prosecution strikes at a prospective juror who is a member of defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in a particular case, the prosecution must at least articulate some plausible race-neutral reason for deleting those factors will somehow affect the person's ability to perform his or hers duties as a juror. (Petitioner's Appendix A-11)

The prosecutor in the case at bar explained, "I don't like the way they looked." (Petitioner's Appendix A-41) and

because their mustaches and beards looked suspicious to him. (Petitioner's Appendix A-41). The prosecutor's statement that he did not like the way the two African-American jurors looked was a pretext for discrimination. However, once this reason was given, the Court was correct in its observation that a judge could decide that the reason given was a pretext. This leads to the third step of the analysis, when the judge must decide whether to believe the proffered reason, or to find that purposeful discrimination has occurred.

The Court of Appeals says the reason given must be related to the particular case and to the outcome of the case, following Batson. (Petitioner's Appendix A-12). "The Prosecutor therefore must articulate a neutral explanation related to the particular case to be tried." 476 U.S. at 98, 90 L.Ed. 2d at 88. The Court of Appeals stated that it did not believe the reason given was race-neutral in actuality, but pretextual. (Petitioner's Appendix A-12) The Court of Appeals was correct in its observation that:

Where the prosecution strikes a prospective juror who is a member of the Defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror.

(Petitioner's Appendix A-11)

The Court of Appeals was applying the decisions of Batson and the Missouri Supreme Court's decision of State v. Antwine, 743 S.W. 2d 51 (Mo. 1987) (en banc) which

held that the

proffered neutral explanation must give a clear and reasonable significant explanation of the State's legitimate reason for exercising the challenges.

The Court of Appeals has found that the prosecution must offer some reason which is not related to race other than whether or not the prosecutor likes or dislikes the "looks" of the prospective jury panel member.

The Petitioner argues this Court in Hernandez v. New York, 111 S.Ct. 1859, 1866(4) (1991) rendered a definition of a race-neutral explanation that was not satisfied by the Court of Appeals in the case at bar. The Court of Appeals in the case at bar correctly in the second step of the Batson three-part inquiry states that "the issue is the facial validity of the prosecutor's explanation."

The facial validity of the prosecutor's explanation is found in the words used by the prosecuting attorney in consideration of the facts and circumstances of the jurors whom he is seeking to strike.

The prosecuting attorney in the case at bar said he wanted to strike the particular jurors because he did not like the way they looked. The men looked like African-American men.

The Court of Appeals could and did find that the reason given of disliking a prospective juror's "looks" was insignificant and unreasonable enough to find that the explanation given was a pretext for a racially motivated strike. United States v. Bentley-Smith, 2 F.3d 1368, 1375

(10, 11) (5th Cir. 1993), held intuition is "more vulnerable to the inference that the reason proffered is a proxy for race."

United States v. Banks, 10 F.3d 1044, 1049 (1.2) (4th Cir. 1993), held that

the reasons...offered by the prosecutor - an unemployed status, suspected alcoholic, family member resident in neighborhood in which some defendants now or formerly resided, shabby dress suggesting irresponsible attitude toward jury service, criminal history - were not intrinsically suspect, were adequately supported by observable fact and were therefore properly determined by the court to be race-neutral.

The case at bar is distinguishable from Banks because in Banks the prosecutor and the record specifically indicated the "shabby dress" of the juror, which had an articulatable race-neutral reason which did not rest just upon the prosecutor's statement of, "I didn't like their looks."

In the case at bar, the reason given had nothing directly to do with the case on trial, such as the jurors' specific backgrounds which might affect their hearing of the case, as cited in United States v. Bentley-Smith, or a reason related to their ability to serve as a juror, such as eye contact or inattentiveness, which would suggest the juror would not pay the attention needed to understand and decide correctly the case. The reason of facial hair given for striking a juror is not nearly as clear or logical or believable a reason as those cited in United States v. Bentley-Smith. Striking a juror because of his facial hair could be at best a pretext for a clever, more specific

reason, such as racism.

The prosecutor's statement he did not like the way the two African-American jurors looked is a cover for discrimination. In State v. Blackmon, 477 S.W.2d 481, 486 (2-3) (Mo.App. 1988), the Missouri Court of Appeals found that the Batson application of the equal protection clause forbids the use of a peremptory challenge to a potential juror solely on account of his race "or on the assumption that black jurors as a group will be unable impartially to consider the state's case against a black defendant." quoting from Batson, 476 U.S. at 89.

The Missouri trial court found in State v. Blackmon, supra at p. 486 that the assistant prosecutor struck the black venireman for the following reasons: "I did not strike Armour because he was black. I struck him because he was a member of the black community." At an evidentiary hearing, the assistant prosecutor was asked his reason for striking Mr. Armour. The prosecuting attorney testified he was raised in southeast Missouri and he had personal knowledge that towns in southeast Missouri had black communities. He said, "I was again concerned that he [Mr. Armour] would not only know Mr. Blackmon or his family, but again be partial toward Mr. Blackmon based upon Mr. Blackmon's good family reputation in the black community." The Court of Appeals upheld the trial court's finding the state did not have a racially neutral reason for striking the venireman.

In the case at bar, the prosecutor said he struck the

two African-American jurors because of their "looks."

Striking a person because of his looks is a cover for striking him because of his race. The prosecutor's only reason for striking juror #22, an African-American man, was because of the way he looked to the prosecutor. For a prosecutor to say he does not like the way they look is the same as a prosecutor saying he does not like where they come from. If the person comes from a black community and is struck as a peremptory challenge by the prosecutor, the prosecutor is acting upon the assumption that black jurors as a group will be unable impartially to consider a state's case against a black defendant. See Batson, 476 U.S. at 89.

The Petitioner attacks the Court of Appeals for merely following this line of logic that a reason given which is not clearly related to a juror's ability to hear fairly and decide the case is less believable. (Petitioner's Petition, p. 16)

The Panel Opinion did not pronounce a new standard when it stated that:

the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror.
(Petitioner's Appendix, A-11)

United States v. Brooks, 2 F.3d 838 at p. 840(1-3) (8th Cir. 1993), rehearing denied, cert. denied, 114 S.Ct. 1117, 127 L.Ed. 2d 427, held, citing Hernandez v. New York, 111 S.Ct. 1859, 114 L.Ed. 2d 395 (1991) a prosecutor's explanation for a strike is considered race-neutral if the

explanation is facially based on something other than the juror's race, i.e., if discriminatory intent is not inherent in the stated reason.

The Petitioner states the Court of Appeals has added a "new legal requirement" by saying the Court of Appeals requires the striking litigant to "articulate some plausible race-neutral reason for believing those factors will somehow affect the person's abilities to perform his or her duties as a juror." (Petitioner's Petition p. 17) The Court of Appeals in the case at bar has not created a new legal requirement but has merely repeated what is the second step of the Batson analysis. The Court of Appeals' decision of following the Batson requirements that the prosecution articulate a race-neutral explanation for striking the jurors in question is the same definition which Hernandez gives of what is a "neutral explanation." Hernandez at p. 1866(4).

This Court in Hernandez stated a "neutral explanation" is "an explanation based on something other than the race of the juror." In the case at bar, the prosecuting attorney stated his reason for striking the jurors was "I don't like the way they look."

The Court of Appeals expresses what Hernandez held when it says a "neutral explanation" has the issue of "the facial validity of the prosecutor's explanation." The Court of Appeals states the prosecutor's explanation must state some factors that will affect that person's ability to perform his or her duties as a juror and is based on something other than

the race of the juror, in order to be believable. The Court of Appeals has followed the application of the Batson standard as expressed in Hernandez.

United States v. Brooks, 2 F.3d 838 (8th Cir. 1983), rehearing denied, cert. denied, 114 S.Ct. 1117, 127 L.Ed.2d 427 held if the defendant makes a prima facie showing that the prosecutor exercised peremptory challenges on the basis of race, then the burden shifts to the prosecutor to give a race-neutral explanation for striking the prospective jurors.

In Brooks, supra, at p. 841(6) the United States Court of Appeals for the 8th Circuit, applied the same second step of the Batson test in evaluating the reasons the prosecutor used a peremptory challenge in the case at bar. In Brooks, supra at p. 841(5), the prospective juror told of his experience as a victim of police brutality. The Court of Appeals said this reason articulated by the prosecuting attorney qualified as a race-neutral reason for the peremptory challenge.

In Hernandez, at p. 1867, col. 1, this Court accepted as race-neutral the prosecutor's explanation for his peremptory challenges against those whose conduct during voir dire persuaded him they might have difficulty in accepting the translator's rendition of Spanish-language testimony. This Court found at Hernandez, at p. 1871 (12) no clear error in the state trial court's determination that the prosecutor did not discriminate on the basis of the ethnicity of the Latino jurors. This Court said:

Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer.

The prosecutor's concern in Hernandez as to whether or not the jurors would defer to an official translation directly impacts upon that juror's ability to render the type of jury service which would be correct and appropriate in terms of their duty as a juror. Their ability to be bilingual was not a challenge based on the assumption that the race of the prospective Latino jurors would make them "as a group" that would "be unable impartially to consider the State's case against a" Latino "defendant," quoting the language of Batson, 476 U.S., at 89(2,3).

Hernandez is authority for the Court of Appeals' ruling that the trial court should look at factors which somehow affect the person's ability to perform his or her duties as a juror in deciding if a race-neutral reason has been articulated by the state.

In Pemberthy v. Beyer, 19 F.3d 857, 872 (10, 11) (3rd Cir. 1994) rehearing and suggestion for rehearing en banc denied, the Court of Appeals said the trial court should consider any extrinsic (emphasis added) evidence of motivation such as whether the prosecutor's strikes correlate better with a language ability or with race. The prosecutor made peremptory challenges of Spanish-speaking jurors on the ground of his concern that they would not accept the court-

approved translation of taped conversations in Spanish.

Pemberthy at p. 872 said the court should consider if the translation issue was central to the case. Pemberthy stands for the proposition the juror's ability to perform his or her duty as a juror is a race-neutral reason for a peremptory challenge.

Concerning the standard of review of federal court district decisions on the issue of the third step of a Batson challenge, the standard advocated by the Petitioner of whether the State Court's factual determination is "fairly supported by record" has not been met. There is not fair support from the record to uphold the State Court's finding of no intentional discrimination. The Missouri court's decision and the District Court decision is "not fairly supported by the record," as required by 28 U.S.C. Section 2254(d)(8). Subsection (d)(8) means the factual determination of no purposeful discrimination by the prosecutor is not supported by the record.

Batson, in footnote 21, says, "a review court ordinarily should give" the trial court "findings great deference." 476 U.S. at 98, 90 L.Ed. 2d at 89. The Petitioner complains on page 24 of his Petition that "the record below can support the United States District Court and the Missouri Court of Appeals. The Court of Appeals states:

The prosecution's explanation for striking juror 22 in the present case was pretextual. The prosecution's explanation was facially neutral...without more, which is precisely what Antwine cautions against. 743 S.W. 2d at 65. (Petitioner's Appendix A-12)

The Court of Appeals, when it found the prosecutor's reason was insufficient, has found that the prosecutor's brief explanation of the "looks" of the jurors was merely a pretext. The words, "without more," refer to an explicit requirement of the state to articulate exactly why it seeks to strike the specific juror with a reason that bears no relationship to the race of the juror.

In Splunge v. Clark, 960 F.2d 705, 709(6) (7th Cir. 1992), rehearing denied,

A race-neutral explanation is required precisely because race-neutral intent in striking potential jurors is required. Where the prosecutor's neutral explanation is an obvious mask for a race-based challenge, the prosecutor has not met his burden under Batson.

In Splunge, the prosecution sought to strike a venireman named Connie Brodie. A question the prosecutor asked Ms. Brodie was, "The fact that Mr. Splunge is a black man, as you are a black woman, is that going to enter into your mind in determining whether he is guilty or innocent?" Ms. Brodie answered, "No." Splunge, at p. 707(1). The only other question asked of Ms. Brodie was, "If the state proves its case to you beyond a reasonable doubt, will you find the defendant guilty?" Ms. Brodie answered, "Yes." Splunge, at p. 708(5).

The Court of Appeals found the prosecutor's explanation was "an obvious mask for a race-based challenge." Splunge, at p. 709(6).

The Petitioner desires to require the defense attorney

at the trial court level to inform the trial court that he believes the race-neutral reason for striking the jurors in question was "a pretext." (Petitioner's Petition, p. 25) The Petitioner is attempting to add a requirement for the defense bar by a misapplication of cases such as State v. Hudson, 822 S.W.2d 477 (Mo.App. 1991) by requiring the defense attorney to say the specific words that the race-neutral explanation was a "pretext." Batson does not require this. State v. Hudson, at p. 481(3) merely states, "once the State came forward with neutral explanations, the Defendant had the obligation to demonstrate that the State's proffered explanations were pretextual." State v. Hudson does not stand for the proposition that the defense counsel must make his objection using a specific word "pretextual" in referring to the prosecutor's peremptory challenge. The Court in Batson said, "We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." Id. 476 U.S. at 99, 90 L.Ed. 2d at 89. Respondent is seeking to add a requirement to a Batson challenge to make the defense attorney at trial say the particular word, "pretextual," when such is not required.

The Petitioner states what he believes are the facts in the record supporting a determination of no intentional discrimination. First, the Petitioner states such a fact is the prosecutor voluntarily defending his use of peremptory challenges without a request by the judge. (Petitioner's Petition, p. 28). This is without merit. The prosecuting

attorney at the trial court level was probably familiar with the Batson decision and understood that he had to come forward with a race-neutral reason for his peremptory challenge of the jurors. The prosecutor probably decided there was no need for him to wait for the trial court to ask an expected question. Once a prosecutor has offered race-neutral explanation for peremptory challenges and the trial court has ruled on the question of intentional discrimination, the first issue of whether the defendant made a *prima facie* showing is moot. See U.S. v. Bishop, 959 F.2d 820 (9th Cir. 1992).

The Petitioner claims the prosecutor's failure to strike all African-American venirepersons is an indicator the prosecutor did not intend to discriminate. (Petitioner's Petition, p. 27). Splunge v. Clark, *supra*, held under the Fourteenth Amendment a prosecutor may not exercise even a single peremptory challenge if through that challenge he intentionally discriminates on the basis of race.

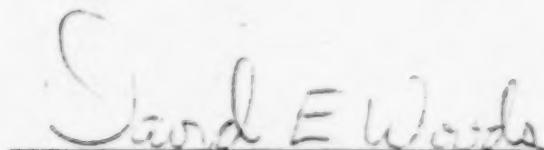
The Petitioner claims that the prosecution was unaware of which venirepersons were African-American (Petitioner's Petition, p. 28). The defense attorney asked the trial court if it would call "those two individuals to ask them if they were Black or would the court judicial notice that they were Black individuals." The defense attorney was met with the trial court saying "no." (Petitioner's Appendix A-42). The trial court's ruling indicates it was obvious to the trial court the two prospective jurors were African-American.

In summary, the Court of Appeals correctly applied the analysis and reasoning behind Batson and Hernandez, recognizing that anyone can give a facially race-neutral reason for discrimination, but that the Court does not have to believe that reason. Further, the Court was correct in deciding that the trial court's decision of no intentional discrimination was not fairly supported by the record.

CONCLUSION

For the reasons stated herein, the Respondent prays this Court shall not issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, but shall sustain the judgment of that Court, and any other relief the Court deems just and proper to grant.

Respectfully submitted,



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